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No. 03-347

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALPHONSO CORNELIUS,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the appellate court erred in affirming the district court's grant of the Employer's motion for judgment as a matter of law after a jury trial, where the Employer produced a legitimate, non-retaliatory reason for terminating the Employee (sexual harassment of an employee of one of the Employer's largest customers); the Employee presented no evidence that the customer's employee did not report the harassment or believe she was harassed and no evidence that the Employer did not believe the customer's employee or the customer's supervisor who reported the harassment to the Employer's management; and the Employee himself admitted to making sexually suggestive remarks in the presence of the customer's female employee.

CORPORATE DISCLOSURE

United Parcel Service, Inc., a Delaware corporation, is the ultimate parent of United Parcel Service, Inc., an Ohio corporation. United Parcel Service, Inc., a Delaware corporation, is the only UPS-related entity that has outstanding common stock issued in a public offering. United Parcel Service, Inc., a Delaware corporation, and United Parcel Service of America, Inc., a Delaware corporation, have outstanding debt securities that were issued in public offerings.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, United Parcel Service, Inc. ("UPS"), requests that this Court deny the Petition for Writ of Certiorari ("Pet.") filed by Alphonso Cornelius, seeking review of the unpublished decision of the U.S. Court of Appeals for the Eleventh Circuit, affirming the district court's judgment as a matter of law for UPS.

RESTATEMENT OF THE CASE AND FACTS

A. The Proceedings Below

1. The Verdict and Rule 50(b) Motion

The plaintiff/petitioner, Alphonso Cornelius ("Cornelius"), sued his employer, United Parcel Service, Inc. ("UPS"), on a single claim of retaliation. The retaliation claim was tried to a jury, which, after a four-day trial, returned a verdict for Cornelius. After the verdict was returned, UPS renewed its Rule 50(b) motion for judgment as a matter of law, arguing, among other things, that no reasonable fact-finder could determine from the evidence presented that Cornelius had proved his retaliation case. Agreeing with UPS, the district court granted UPS's motion, concluding that "based on all the testimony and evidence at trial, . . . there is insufficient evidence for a jury to conclude that [Cornelius] was retaliated against for engaging in a statutorily protected activity in violation of Title VII." (Pet. App. 25.) It then entered judgment for UPS, ruling that "the facts and inferences point overwhelmingly in favor of [UPS] such that reasonable people could not arrive at a contrary verdict." (Pet. App. 25.)

2. The Appeal

Cornelius appealed to the Eleventh Circuit. After briefing and oral argument, the appellate court affirmed the final judgment for UPS. Agreeing with the district court, the panel concluded that Cornelius "did not present evidence sufficient to overcome UPS'[s] proffered legitimate non-retaliatory reason for his termination" (Pet. App. 9) because "[i]n light of the evidence produced by UPS, and the ***lack of evidence produced by Cornelius***, there was nothing upon which the jury could legitimately draw the inference that UPS'[s] proffered non-retaliatory reason for its decision to terminate Cornelius was pretextual." (Pet. App. 8; emphasis added.) Following the reasoning of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*,[1] the court held that "[t]here was no legally sufficient evidentiary basis upon which a reasonable juror could have found that UPS retaliated against [Cornelius] because he filed a complaint of racial discrimination." (Pet. App. 9.)

B. The Undisputed Facts

The petitioner, Alphonso Cornelius, drove a package delivery truck for United Parcel Service from 1990 until he was terminated in 1999. His UPS supervisors and customers considered him a good driver and employee. He had only one notable blemish on his record, and that was an allegation of sexual harassment lodged against him by a UPS customer in 1996. Based on this accusation, Cornelius was terminated. He grieved the termination through his union's grievance process and was reinstated.

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[1] 530 U.S. 133 (2000).

Two years later in November 1998, Cornelius, an African-American, received a warning letter for having a minor accident with his truck. That same day, or the next, Cornelius reported to Ralph Terrell, the business manager, that his supervisor, Jeff Whitney, had told him a racist joke that offended him.[2] Without delay, UPS managers investigated Cornelius's allegation. Despite Cornelius's refusal to cooperate in the investigation, UPS managers sought Whitney out and confronted him. When Whitney admitted telling Cornelius the offensive joke, UPS gave Whitney, a 23-year employee, the option of resigning or being fired. Whitney resigned.

After Whitney's resignation, Cornelius was shunned by his fellow package truck drivers who, according to Cornelius, also threatened to get him back for getting Whitney fired. Cornelius told his supervisors about the shunning and asked one supervisor to allow him to start work later in the morning to avoid being around the other drivers. He was allowed to for a brief period. On several occasions, UPS supervisors asked Cornelius how he was managing. He told all of them that he was okay and could handle the situation.

Five months later, in April 1999, a second sexual harassment complaint was lodged against Cornelius, this time by AT&T, a very important UPS customer. AT&T manager, Arlene Ramos, testified that one of her reports,

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[2] In his petition to this Court, Cornelius also claims that, at the time, he also complained that Whitney did not give a warning letter to a white driver who had had a similar accident. But Cornelius did not mention this alleged "discrimination" in his retaliation Complaint against UPS.

Debra McGee, came to see her because she did not want to work the loading dock that evening. McGee told Ramos about a conversation she had had with Cornelius during one of his pick-ups. Ramos had McGee type up a statement of what was said. Because McGee reported that Cornelius had said a disgusting thing to her about a sexual act, Ramos reported the incident to AT&T Human Resources and to UPS. When Ramos spoke to Dave O'Hanna, a manager at UPS, she told him that she thought Cornelius needed help and that she did not want him back in her facility.

At trial Cornelius admitted that he had conversed with McGee about her divorce. He admitted that he told her "all men cheat and they will have more women" and that he said "why don't you try a black guy." He also admitted to saying, "Do you have any black in you? Do you want some?" He testified that he addressed this remark to his co-worker Charlie Fox, but conceded that McGee was present when he said it.

UPS investigated the allegation – as it had the previous allegation against Cornelius and as it had Cornelius's complaint about Whitney's racist joke. UPS had two meetings with AT&T and requested a second statement from McGee. Terrell took Cornelius out of service pending the investigation. At the end of the investigation, UPS terminated Cornelius by sending him a discharge letter signed by UPS Division Manager, Dave Kolasa. The letter informed Cornelius that he was being discharged for just cause for sexual harassment.

Cornelius grieved his termination, which ended up before a deadlock panel comprising one union representative and one UPS representative. The termination was upheld.

Cornelius then sued UPS, claiming that UPS had retaliated against him by terminating him for complaining about Whitney's discriminatory and derogatory comments.

REASONS FOR DENYING THE PETITION[3]

I. The Eleventh Circuit's Unpublished Opinion Does Not Create Precedent or Conflict, and Its Holding Is Limited to the Facts of This Case

Under Eleventh Circuit Local Rule 36-2, "[u]npublished opinions are not considered binding precedent." U.S. Ct. App. 11th Cir. R. 36-2. Therefore, regardless of whether the Eleventh Circuit erred (and, as we will show, it did not), its opinion is of little, if any, precedential value and

[3] If for no other reason, this Court should deny Cornelius's petition because he used it to improperly and inappropriately impugn the integrity of the Eleventh Circuit by accusing it (falsely) of "distort[ing] the evidence" (Pet. at 13), "ma[king] up facts unsupported by the record" (Pet. at 13), finding facts that "were never presented at trial" (Pet. at 14.), and "improperly manufactur[ing]" evidence. (Pet. at 18.) Cornelius further maligned the Eleventh Circuit by accusing it of being "concerned more with the outcome than in a fair and evenhanded application of the law" and of "hijack[ing] a jury's verdict to rescue a politically well connected corporate entity." (Pet. at 14.) And then with a broad, and very malicious, brush, Cornelius condemned "appellate panels, such as the one in this case," for "discounting evidence presented by the prevailing plaintiff, particularly in cases that involve racial minorities." (Pet. at 14.) We submit that nothing the Eleventh Circuit wrote in its opinion or held in this case justified this vilification. It is one thing to say that a court has overlooked, misapprehended, or misinterpreted facts. It is something else entirely to accuse a court of distorting evidence and manufacturing nonexistent facts (Pet. at 13, 18), of manipulating the outcome to favor one party (Pet. at 14), and of "intellectual[ ]" duplicity. (Pet. at 20.)

thus does not warrant this Court's review. And because the unpublished opinion does not create binding precedent, it cannot be said to conflict with any decision of this Court or of any other court.

Nonetheless, Cornelius suggests that the opinion conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). To the contrary, the Eleventh Circuit correctly applied well-established standards for reviewing judgments as a matter of law and correctly applied the teaching and reasoning of *Reeves* to the very fact-specific circumstances surrounding Cornelius's discharge. (Pet. App. 8-9.) The unique facts of this case and the absence of any new interpretation or expansion of existing law make the Eleventh Circuit's opinion one that this Court should decline to review.

II. Cornelius Merely Seeks Error Correction

Cornelius petitioned this Court for only one reason: he believes that the district and appellate courts erred in countermanding the jury's verdict. Thus, he comes to this Court seeking error correction. But this Court "do[es] not grant a certiorari to review evidence" or to "discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Yet this is precisely what Cornelius is asking this Court to do. The only way this Court could address Cornelius's argument that the Eleventh Circuit "substitut[ed] its view of disputed facts, and creat[ed] facts that did not exist in the record" (Pet. at 13) would be to review the evidence and discuss the facts. This Court does not do this because its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases."

Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring).

Although Cornelius doesn't understand it, both courts ruled against him because he failed to carry his burden to prove that UPS's reason for discharging him was false and because no rational fact-finder could conclude that his discharge was retaliatory.

III. Under *Reeves*, UPS Was Entitled to Judgment As A Matter of Law Because Cornelius Presented Insufficient Evidence That UPS's Reason For Discharging Him Was A Pretext For Retaliation

It appears that Cornelius's argument to this Court is three-fold. First, he seems to be saying that because he denied that he sexually harassed Debra McGee and because the jury, ostensibly, believed him, he carried his burden to prove that UPS's given reason for terminating him was pretextual. (Pet. at 15 n.5; 16 n.6.) Second, he claims that because "UPS failed to call any of its claimed decision-makers to trial to establish their alleged good faith belief" that he harassed McGee, UPS did not carry its (supposed) burden to prove that the termination was based on its good faith belief that he had committed sexual harassment. (Pet. at 16.) And third, raising a theory for the first time, he says that because he complained about Whitney's racist joke to Ralph Terrell in November 1998 – thereby purportedly exposing Terrell's tolerance of Whitney's racism – and it was Terrell who took him out of service in April 1999, the jury was free to infer that

Cornelius was terminated as a result of Terrell's retaliation.[4] (Pet. at 17.)

Cornelius's arguments show that he lacks an understanding of the plaintiff's burden in a retaliation case.

A. Cornelius Admitted to Engaging in Conversations of a Personal and Sexual Nature

Although Cornelius tells this Court that he "did not in any manner sexually harass the customer" (Pet. at 16 n.6) and thus the Eleventh Circuit "mischaracteriz[ed]" the evidence when it stated that he "conceded he made the [sexually suggestive] remarks" (Pet. at 16 n.16; 15-16), here is what the trial transcript shows:

> The Court: Did you and Mr. [Charlie] Fox talk with Miss McGee?
>
> Cornelius: Yeah, we talked with Miss McGee. . . . She was a part of the conversation

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[4] This was not Cornelius's theory at trial. There was no evidence that Terrell, or any other UPS supervisor or manager, was mad at him for getting Whitney fired. Cornelius's theory at trial was that his ***co-workers*** were mad at him for getting Whitney fired. But, of course, this theory does not work in a retaliation claim because his co-workers had no authority or ability to terminate him. *See, e.g., Reynolds v. Land O'Lakes, Inc.*, 112 F.3d 358, 364 n.6 (8th Cir. 1997) (noting that opinions of non-decisionmakers are insufficient to establish pretext). It also does not work because, although Terrell took Cornelius out of service pending the investigation of AT&T's complaint, Cornelius was officially terminated in a discharge letter signed by Dave Kolasa. Because Cornelius raises this theory for the first time here, we will not address it further in this opposition brief.

because she came over when Fox and I was talking.

* * *

Attorney: And then you said to the – to Miss McGee at the AT&T facility, "Why don't you try a black man," isn't that correct?

Cornelius: Yeah, We were talking about a marriage, and I said, "Why don't you try a Black guy."

* * *

Attorney: All right. Now, you also have stated and admitted that you made the statement, "Do you have any Black in you? Do you want some?" That you made that statement correct?

Cornelius: To Charlie.

Attorney: But you say that it was to Charlie Fox, the other UPS driver, and not to Miss McGee, is that correct?

Cornelius: Well, me and Charlie always had the conversation. She always came over where we were, or where I were and then when Charlie came she appeared again. So any conversation we had she came over. We didn't come to her. I didn't come to her.

(Rec. Doc 85 – Pgs 55, 57.) As this Court can see, Cornelius admitted that he made the sexually suggestive remarks and that McGee was present when he made them. Thus, the Eleventh Circuit did not mischaracterize Cornelius's testimony.

Even though Cornelius denied making the statements *to* McGee, his subjective, self-serving testimony does not provide sufficient evidence to undermine UPS's reason for his discharge. *See Hall v. Gary Cmty. Sch. Corp.*, 298 F.3d 672, 676 (7th Cir. 2002). It was undisputed that Debra McGee complained to her supervisor, Arlene Ramos, about these and other statements Cornelius made in her presence and gave two written reports that were used in UPS's investigation of her complaint. Cornelius offered no evidence that McGee did not complain or was not offended by his statements. He offered no evidence that Ramos did not believe McGee or report the incident to AT&T and UPS management. He offered no evidence that UPS did not investigate the complaint or believe both women. *See, e.g., Burns v. Check Point Software Techs., Inc.*, No. 3:01-CV-1906-P, 2002 WL 31455598, at *13 (N.D. Tex. Oct. 31, 2002) (noting that the plaintiff presented no evidence suggesting that the customer complaints were fabricated or that the employer mischaracterized or misconstrued the nature of the complaints; and stating that the employer was entitled to believe what it wanted to about the customer complaints). He offered no evidence that UPS did not rely on McGee's written statements and on Ramos's report in discharging him. *See id.* (entering summary judgment for the employer where the plaintiff did nothing to discredit the employer's reliance on customer complaints in deciding to terminate him).

Because Ramos was a disinterested witness and because Cornelius did not contradict or impeach her testimony, the Eleventh Circuit was permitted to accept her statements as true. *See Reeves*, 530 U.S. at 151 (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2529, at 300 (2d ed. 1995)). Given

Cornelius's lack of evidence of the falsity of UPS's legitimate, non-retaliatory reason for terminating him, "no rational factfinder could conclude that [his termination] was [retaliatory]." *Reeves*, 530 U.S. at 148.

B. The Plaintiff, Not the Defendant, Carries the Burden of Proving That Retaliation, Not the Legitimate Reason Given, Motivated the Employer

An appellate court reviews the district court's grant of judgment as a matter of law for the defendant *de novo*, viewing the evidence and drawing reasonable inferences in the plaintiff's favor. *See Hall v. Gary Cmty. Sch. Corp.*, 298 F.3d 672, 675 (7th Cir. 2002). The court's "inquiry is not to second-guess the jury's view of the contested evidence, but to determine whether, given the totality of the evidence, [the plaintiff] presented the jury with legally sufficient evidence from which it could conclude in his favor." *Id.* (citing *Massey v. Blue Cross-Blue Shield*, 226 F.3d 922, 925 (7th Cir. 2000)). The appellate court must view the evidence and the inferences that may be taken from it in the light most favorable to the party against whom the judgment was granted. *Massey*, 226 F.3d at 924. But when, in reviewing the evidence in this proper light, the court finds that the nonmoving party did not introduce enough evidence to support his claim, "judgment as a matter of law is correct." *Id.*

Thus, on review of the judgment for UPS, the only issue before the Eleventh Circuit was whether Cornelius had met his burden of proving sufficient evidence that UPS's stated reason for terminating his employment was pretextual and that the real reason he was discharged was to retaliate against him for complaining about Whitney's

racist remarks. *See Hall*, 298 F.3d at 675 (citing *Reeves*, 530 U.S. at 146-49; *Massey*, 226 F.3d at 925). "*Reeves* clearly mandates a case-by-case approach, with [the] court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact' " that the employer retaliated against him. *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000) (quoting *Reeves*, 530 U.S. at 143). Thus, the ultimate burden of proof "remains at all times with the plaintiff." *Reeves*, 530 U.S. at 143 (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

Nonetheless, in his petition to this Court, Cornelius, instead of showing how he satisfied ***his*** burden of proving pretext,[5] claims that it was UPS's burden to prove that ***it*** had a "good faith" belief that Cornelius committed the "alleged transgressions." (Pet. 18, 18 n.7.) What he fails to comprehend is that the law imposed on UPS only one burden: the burden to ***produce*** an "honest explanation of its behavior." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988)). Nothing required UPS to give the explanation through its "decision-makers' " testimony as to their "good faith" beliefs. *See Burns*, 2002 WL 31455598, at *7 ("[The] burden on the employer is one of production only, not

[5] An employee may demonstrate that his employer's reasons are unworthy of credence by showing "through evidence" that 1) the proffered reason had no basis in fact; 2) the proffered reason did not actually motivate his discharge; or 3) the proffered reason was insufficient to motivate discharge. *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

persuasion, and involves no credibility assessments.") (citing *Reeves*, 530 U.S. at 142).

UPS was permitted to, and did, give an honest explanation of its behavior through the testimony of Arlene Ramos, who believed McGee's complaint serious enough to report it to AT&T's Human Resources department and to UPS's management. It is undisputed that she told UPS that she did not want Cornelius back in her facility. UPS, through Stan Purvis, its security officer, investigated the complaint and met with AT&T personnel twice before it decided to terminate Cornelius. Although Cornelius was "taken out of service" and assigned to the warehouse pending UPS's investigation of the complaint against him, he was not discharged for sexual harassment until the end of April, when Purvis had completed his investigation.

Thus, UPS carried its burden, but Cornelius did not carry his. Cornelius presented no evidence showing that the reason he was discharged – sexual harassment of an employee of an important UPS customer – had no basis in fact. *See Mechnig*, 864 F.2d at 1365. And he presented no evidence showing that the customer's complaint of sexual harassment did not actually motivate his discharge, or that the sexual harassment complaint was insufficient to motivate discharge. *See id.*

The facts of *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000), are nothing like the facts here. In *Munoz*, the plaintiff was reprimanded for kissing a female co-worker. Munoz, a sixty-four-year-old Cuban-American, had been employed for twenty-seven years and during that time had never before received a reprimand. Although he did not specifically admit to the incident that brought about his first reprimand, he admitted that it was his

practice to greet female co-workers with a kiss, but maintained that his employer knew about this practice and had never objected to it and that no female employee had ever complained about it.

Munoz alleged that his termination, which was purportedly based on his failure to obey an instruction not to discuss his reprimand with anyone, was really a pretext for age discrimination. Munoz, unlike Cornelius, offered extensive evidence on the issue of pretext: In his twenty-seven years of employment, he had never received a documented reprimand. *Id.* at 1345 n.5. Munoz's employer knew of his kissing practice but never admonished him for it. *Id.* Munoz was terminated following a single warning. *Id.* Munoz's reprimand was written in English, a language Munoz did not understand. *Id.* And Munoz's younger replacement had received several reprimands during the course of his employment. *Id.*

Here, Cornelius, unlike Munoz, had previously received a customer complaint of sexual harassment. And even though a customer complaint of sexual harassment was not one of the "offenses called 'cardinal sins,'" UPS terminated him pending investigation. (Pet. at 11.) Here, even though race-based remarks were not one of the "offenses called 'cardinal sins,'" UPS terminated Whitney, without a warning, when he admitted telling Cornelius the offensive joke. (Pet. at 11.) UPS's first termination of Cornelius, its forced termination of Whitney for racial remarks, and its forced termination of another driver accused of indecent exposure (Pet. at 11) – all without *any* warning, showed that it even-handedly treated all such transgressions as dischargeable offenses and that it

treated Cornelius no differently than it treated other employees. These facts easily distinguish *Munoz*.

CONCLUSION

Reeves teaches that a plaintiff's prima facie case of discrimination combined with ***sufficient*** evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision ***may*** be adequate to sustain a finding of liability for intentional discrimination. *Reeves*, 530 U.S. at 148. Here, Cornelius presented ***no evidence*** that would allow the jury to reject UPS's nonretaliatory reason for terminating him. It was undisputed that McGee was offended by his remarks and reported them to her supervisor Ramos. It was undisputed that Ramos thought the incident serious enough to report to AT&T and UPS. It was undisputed that Ramos told UPS she didn't want Cornelius back in her facility. It was undisputed that Stan Purvis, a UPS security officer, met with Ramos twice at AT&T and interviewed McGee. It was undisputed that UPS relied on McGee's statements and Ramos's complaint in discharging Cornelius. There was no evidence that UPS conspired with AT&T or concocted a bogus explanation for terminating Cornelius. Without presenting evidence that UPS's reason for firing him was false, Cornelius did not carry his burden of proving

pretext, and thus judgment as a matter of law was correctly entered for UPS.

Respectfully submitted,

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